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No. 89-1482

In the Supreme Court of the United States

October Term, 1989

LAWRENCE COAL COMPANY,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. Has the Petitioner, under the principles of *res judicata* and judicial estoppel waived its right to challenge the adjudication of the Pennsylvania Environmental Hearing Board?

II. Whether the Petitioner received full due process of law in the adjudication of its case by the Pennsylvania Environmental Hearing Board?

III. Does the Petitioner raise any important question of federal law meriting review by the Supreme Court of the United States?

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RESPONDENT'S BRIEF IN OPPOSITION TO

THE PETITION FOR WRIT OF CERTIORARI

The Commonwealth of Pennsylvania, Department of Environmental Resources, Respondent in the action below, respectfully prays that this Honorable Court deny the Writ of Certiorari to the denial of appeal by the Pennsylvania Supreme Court, filed on the 18th day of December, 1989.

OPINIONS BELOW

The Order of the Commonwealth Court of Pennsylvania, dated April 8, 1988, remanding the case to the Pennsylvania Environmental Hearing Board for reconsideration and a new decision, is reproduced in the Appendix. Respondent concurs in the Petitioner's presentation of the other relevant opinions below, as presented in Appendices A through E of the Petition for Writ of Certiorari.

COUNTERSTATEMENT OF THE CASE

Petitioner, Lawrence Coal Company (hereinafter "Lawrence") seeks to reverse the decision of the Pennsylvania Supreme Court, the Pennsylvania Commonwealth Court, and the Pennsylvania Environmental Hearing Board (hereinafter "Board") to assess civil penalties against Lawrence in favor of the Respondent, Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER") for violations by Lawrence of the Clean Streams Law, 35 P.S. §§691.5 and 691.315 (Purdon's 1977). The procedural history of this case is as follows:

> On February 25, 1981 DER filed with the Pennsylvania Environmental Hearing Board a Complaint for Civil Penalties against Lawrence, alleging (1) the discharge of acid mine drainage, (2) the failure to implement and maintain effective erosion and sedimentation controls, (3) the failure to properly dispose of toxic waste, and (4) the disturbing of land designated as a barrier. The allegations pertained to Lawrence's surface coal mining operations in Springfield and Dunbar Townships, Fayette County, Pennsylvania during 1980 and 1981. Lawrence contested DER's Complaint. Eleven days of evidentiary hearings before Board Chairman Dennis J. Harnish concluded on November 23, 1982, although an additional deposition and exhibits were admitted to the record on January 31, 1983. The integrity of the evidentiary record has never been challenged.
>
> Board Chairman Harnish resigned from the Board on May 16, 1983, without having prepared an adjudication. On September 15, 1983 the Board appointed Edward R. Casey as a Hearing Examiner to review the

record. Following a suggestion made by Mr. Casey to counsel that the case be settled for a maximum of $1000, on November 7, 1983 DER filed a Petition for Recusal of Mr. Casey and a Motion for Reassignment, alleging, *inter alia*, that Mr. Casey had ignored a recommendation of former Chairman Harnish to find in favor of DER. The Board granted DER's Petition and Motion, and reassigned the case to Board Member Anthony J. Mazullo, Jr. for the preparation of Adjudication.

On November 30, 1983, Lawrence filed a petition requesting either a dismissal of the case because of alleged improper communications between former Board Chairman Harnish and legal counsel for DER or, in the alternative, a reassignment of the case to a neutral hearing examiner who was not involved with the Board during Harnish's tenure. The Board denied the petition (per Members Mazullo and Edward Gerjuoy).

Board Member Mazullo prepared a draft Adjudication which had not been adopted by the Board at the time of his resignation on January 31, 1986. On May 27, 1986, the Board (per Chairman Maxine Woelfling and Member Gerjuoy) issued an Adjudication, which adopted Mazullo's draft with certain modifications, and which assessed civil penalties against Lawrence in the amount of $150,700.

On June 6, 1986 Lawrence filed a Petition for Reconsideration, which, as supplemented, requested that the Adjudication of May 27, 1986 be vacated and that Chairman Woelfling and Member Gerjuoy be recused from any further participation in the case. On June 24, 1986 William A. Roth became a Member of the Board. On September 19, 1986 the Board (per Members Gerjuoy

and Roth) denied the Petition for Reconsideration, and dismissed the request for the recusal of Chairman Woelfling.

Lawrence filed with the Pennsylvania Commonwealth Court on October 16, 1986, a Petition for Review of the Board's orders of September 19, 1986 and May 27, 1986. In its Petition Lawrence made the following alternative prayer for relief;

... (c) Remand the matter to the Environmental Hearing Board and appoint an unbiased hearing examiner who had not previously served with the Department of Environmental Resources to make recommendations to the Environmental Hearing Board.

On January 25, 1988, the Commonwealth Court vacated the Board's orders and remanded the case for new hearings, finding that "... a possibility of unfairness to Lawrence exists and that improprieties might have occurred." On April 8, 1988 Commonwealth Court amended its decision to provide for a new Adjudication, to be issued within 90 days, on the basis of the 1982 record and associated briefs and papers, and without the participation of Chairman Woelfling and Member Roth. Implicit in the Court's ruling was that the Adjudication would be made by Robert D. Meyers who had succeeded Member Gerjuoy on December 7, 1987 as a member of the Board, as throughout these proceedings the Board was limited by statute to three members. *See* 71 P.S. §180-2 (Purdon's 1988 supp.), *repealed*, July 13, 1988, P.L. 530, No. 94, §8(a), effective January 1, 1989.

Neither Lawrence nor DER appealed the January 25, 1988 and the April 8, 1988 orders of the Commonwealth Court, leaving unchallenged the remand for an

Adjudication by one Board member based upon the preexisting record. In accord with the unappealed Commonwealth Court orders, on July 5, 1988 the Board (per Member Meyers) issued an Adjudication based upon the preexisting record, in which he assessed civil penalties against Lawrence in the amount of $104,500.

On August 3, 1988 Lawrence filed a Petition for Review in Commonwealth Court of the Board's July 5, 1988 Adjudication. By its Memorandum Opinion of July 12, 1989 Commonwealth Court upheld the Board's Adjudication, holding that: the issue of whether the Board's decision was tainted was already resolved in Lawrence's previous appeal; under Pennsylvania regulations and common law a single Board Member can base an Adjudication upon a preexisting record; and the Board's Adjudication was based upon substantial evidence.

From the Commonwealth Court decision Lawrence filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, which petition was denied on December 19, 1989.

In conclusion, Lawrence petitioned the Board in 1983 and the Commonwealth Court in 1986 for reassignment of the case to a single Board Member or Hearing Examiner who joined the Board after Chairman Harnish's tenure, and then Lawrence failed to appeal the January 25, 1988 and April 8, 1988 Commonwealth Court orders which remanded this case to the Board for an Adjudication by a Member of the Board who was appointed to that post three and a half years after Chairman Harnish resigned. In spite of this procedural background, Lawrence now argues to this Honorable Court that it should now be granted yet another chance to complain of impropriety in the Environmental Hearing Board's Adjudication.

SUMMARY OF ARGUMENT

Having sought to have the unchallenged record reconsidered by the Environmental Hearing Board and having acquiesced in the Commonwealth Court decision ordering that reconsideration, the Petitioner cannot now challenge the propriety of that procedure. If the challenge is allowed, it fails to establish a denial of due process because the allegations of bias are merely speculative. In any event, the procedural posture of this case is so unique and so unlikely of repetition, that it does not warrant review by this Honorable Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Under The Principles Of Res Judicata And Judicial Estoppel Petitioner Waived Its Right To Challenge The Adjudication Of The Pennsylvania Environmental Hearing Board

Petitioner Lawrence Coal Company contends that the Adjudication of its case by a member of the Pennsylvania Environmental Hearing Board who had not yet been appointed to the Board at the time the Board issued its previous Adjudication, was inherently biased, in violation of the Petitioner's right to due process of law. Petitioner has not supported its contention with any dispositive law,* and what it

*A review of the case citations provided by the Petitioner in support of its argument shows each to be inapposite to the circumstances of this case. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), concerned due process violations by a Michigan Judge who acted as a grand jury in closed proceedings, and then presided over the contempt trial against witnesses who had appeared before him in the grand jury proceedings. In *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973), this court held that the pecuniary interest of the members of Alabama Board of Optometry in the punitive delicensing of thirteen optometrists was sufficient bias to disqualify the Board members from adjudicating the delicensing case which the Board itself was prosecuting. However, in the present case the Petitioner has made no allegation of pecuniary interest against Environmental Hearing Board Member Meyers. The holding of *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975), that an administrative board could both investigate and adjudicate, is irrelevant here; the Environmental Hearing Board did not investigate or prosecute DER's civil penalty claim against the Petitioner. The Petitioner correctly notes that the case of *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) revolves around an interpretation of the administrative delegation provisions of the Railway Labor Act, 45 U.S.C. §§151-163, 181-188, and is unconcerned with Pennsylvania administrative and environmental law. Petitioner's reference to *Federal Trade Commission v. Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed. 2d 398 (1967), which concerned

characterizes as "logic" is but remote speculation. On remand from the first unappealed order of the Pennsylvania Commonwealth Court, Petitioner received a fair and impartial adjudication.

In the January 25, 1988 decision by the Commonwealth Court of Lawrence's first appeal, and in the April 8, 1988 order that the Board adjudicate the case within 90 days without the participation of two of its three members, the Court addressed the future potential for bias, and how many Board Members could adjudicate the case. That decision left only one Member, Robert D. Meyers, to issue the Adjudication. Lawrence did not appeal the Commonwealth Court's orders, and the remand became final. Board Member Meyers' lawful ability to decide the case, and to do so in an untainted manner, is thus *res judicata*. It is not now subject to review merely because the result on remand was more adverse than the Petitioner had hoped. See *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 69 L.Ed. 2d 103 (1981). Pennsylvania's highest court is in accord with this principle: "Ordinarily, a party who consents to, or acquiesces in a judgment or order cannot appeal therefrom." *Brown v. Com., Department of Health*, 495 Pa. 456, 460, 434 A.2d 1179, 1181

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the voting requirements of the Federal Trade Commission, is misplaced for two reasons. First, Commonwealth Court has already decided how many members of the Environmental Hearing Board were needed to adjudicate this case; the Petitioner did not appeal from that decision, and thus, under the doctrine of *res judicata*, that issue is not before this Court. Second, Commonwealth Court's resolution of the issue involved the interplay of the statutory, regulatory, and common law of Pennsylvania, all of which were beyond the scope of *Flotill*, a case of federal origin. In the Pennsylvania case cited by the Petitioner, *Gardner v. Repasky*, 434 Pa. 126, 130, 252 A.2d 704 (1969), the Pennsylvania Supreme Court found an unacceptable likelihood of bias where a member of a municipal Fire Board which complained about a policeman, also sat on the Civil Service Commission which ordered the policeman's suspension. Board Member Meyers played no such dual role.

(1981), quoting 9 *Standard Pennsylvania Practice*, Ch. 38, §162, pp. 134-35. To allow the Petitioner to relitigate this matter would create confusion and uncertainty as to the finality and effect of the judgments of the Commonwealth Court.

Ironically, the relief granted to Lawrence by the Commonwealth Court (i.e. remand for an Adjudication by a Board Member not associated with previous proceedings in the case) is the relief Lawrence requested in its November 30, 1983 Petition to the Board and in its October 16, 1986 Petition for Review filed with Commonwealth Court. Pennsylvania recognizes the principle of judicial estoppel, by which a party is estopped from assuming a position contrary to one assumed in a previous action if that position was successfully maintained. *Associated Hospital Service of Philadelphia v. Pustilnik*, 497 Pa. 221, 227, 439 A.2d 1149, 1151 (1981). Therefore, Lawrence may not now complain that such relief violated its rights.

II. Petitioner Received Full Due Process Of Law In The Adjudication Of Its Case By The Pennsylvania Environmental Hearing Board

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Even were a due process analysis warranted, Lawrence's petition is deficient. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976), this Court laid out several factors to consider in determining what process is due a petitioner claiming a violation of its procedural rights. Respondent DER does not contest the Petitioner's property interest in the civil penalty levied by the Board; also, there has been no argument as to the cost of alternative administrative procedures. Therefore, the merit of the Petitioner's claim

hinges on the second prong of the *Mathews* test: "the risk of an erroneous deprivation of such [property] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. . . ." *Id.* at 424 U.S. 335.

Administrative hearing officers are presumed unbiased. The party asserting a claim of bias bears the burden to rebut the presumption, "... by a showing of a conflict of interest or some other reason for disqualification." *Schweiker v. McClure*, 456 U.S. 188, 195-196, 102 S.Ct. 1665, 1670, 72 L.Ed. 2d 1 (1982). While the Petitioner baldly asserts that Board Member Meyers was placed in an "impossible position" when asked to redecide a case already adjudicated by the Board, it has failed to provide this Court with even the barest evidentiary foundation to show that Board Member Meyers was potentially subject to undue influence, or in any way predisposed against the Petitioner. Lawrence goes on to say: "To decide contrary to the prior decision of his colleagues would be a public betrayal." *Id.* Under this hypothesis a judge or administrative law judge would be disqualified any time he received a remand of a case handled by another judge of the same court. Accordingly all remands would result in dismissal or change of venue. This absurd situation is not the law. In fact judges can, and often do, adjudicate remands of cases they themselves heard in the first instance. See *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed, 2d 712 (1975), citing *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). No probability of unfairness has clouded the adjudication issued by Board Member Meyers. See *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

III. Petitioner Raises No Important Question Of Federal Law Meriting Review By The Supreme Court Of The United States

Lawrence's Petition does not fall within the general criteria established by this Court under U.S. Supreme Court Rule 17, 28 U.S.C.A., for granting review on certiorari. The Petitioner has not alleged that the decision of the Commonwealth Court of Pennsylvania is in conflict with decisions of this Court or the highest court of other states. The Petitioner has never objected to the evidentiary record upon which the Board based its Adjudication. On remand from the Commonwealth Court, Board Member Meyers issued a fair decision, kinder to the Petitioner than the Board's previous determination, and most important, untainted by any appearance of impropriety or likelihood of bias. By its failure to appeal the Commonwealth Court's previous rulings, the Petitioner has triggered the doctrines of *res judicata* and judicial estoppel, and thereby abandoned any constitutional challenges or federal questions it might have raised.

This case evolved through an unusual procedural turn of events, unlikely of repetition, particularly as the Pennsylvania legislature has increased the membership of the Environmental Hearing Board to five members. 35 P.S. §7513(b) (Purdon's 1977, 1989 supp.). Any due process questions which might have existed were a product of unique circumstance, unimportant to anyone but the Petitioner and Respondent in this case. See *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioner asks this Court to review the interpretation of state law rendered by the Commonwealth Court, as to the membership and adjudication requirements of the Environ-

mental Hearing Board. As stated above, Petitioner waived this issue by its failure to appeal the January 25, 1988 and April 8, 1988 orders of that court. Furthermore, absent extraordinary circumstances, federal courts will defer to a state court's interpretation of that state's laws, including rulings by an intermediate state court where, as in the case at bar, the state's highest court has refused to hear a further appeal. *Kolender v. Lawson*, 461 U.S. 352, 355, 103 S.Ct, 1855, 75 L.Ed. 2d 903 (1983) (n.4). Here, Petitioner's challenge to the Commonwealth Court's construction of Pennsylvania law raises no federal question.

CONCLUSION

For the reasons set forth above, the Respondent, Commonwealth of Pennsylvania, Department of Environmental Resources, respectfully asks this Honorable Court to deny the Writ of Certiorari in this matter.

Respectfully submitted,
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APPENDIX

Order of the Commonwealth Court of Pennsylvania Dated April 8, 1988

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 3062 C.D. 1986

LAWRENCE COAL COMPANY,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent

ORDER

AND NOW, April 8, 1988, upon consideration of Petitioner's application for reargument of the above-captioned case, it is ordered that said petition is denied. Further, upon consideration of Respondent's request for clarification of the order entered in the above-captioned case, the order is amended to read as follows:

> The order of the Environmental Hearing Board dated September 19, 1986, in the above-captioned case, affirming the board's prior May 27, 1986 adjudication is vacated. The matter is remanded to the Environmental Hearing Board for reconsideration and a new decision, to be issued within 90 days of the date of this order, on the basis of the 1982 record made before the Board and any associated briefs and papers filed by the parties. Maxine Woelfling and William A. Roth shall not participate in the reconsideration and new decision.

s/Madeline Palladino, Judge